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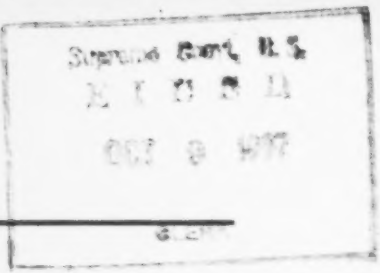

No. 97-186

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

VERN T. WEISS, *et al.*,

Petitioners,

v.

STATE OF ALASKA, *et al.*,

Respondents,

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Alaska

REPLY IN SUPPORT OF PETITION

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14 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REASONS FOR GRANTING REVIEW 1

1. The Court has Jurisdiction to Review the Set-Off Decision 1

2. Important Federal Rights Were Adjudicated 3

3. Respondents Err in Contending That All Other Authority Pertaining To Federal Land Trusts Is Inapplicable 4

4. The Alaska Supreme Court's Approval Of A Management Scheme That Violates Federal Law Is Ripe For Review 5

5. The Settlement Was The Result Of Inadequate Representation 6

6. The Issues Raised by Petitioners Are Properly Before the Court 8

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

Amchem Products, Inc. v. George Windsor, No. 94-1474, 65 U.S.L.W. 4635 (June 25, 1997) 7

Asarco v. Kadish, 490 U.S. 605 (1989) 3

County of Skamania v. State of Washington, 685 P.2d 576 (Wash. 1984) 5

Cox Broadcasting Corp., v. Cohn, 420 U.S. 469 (1975) 1, 2, 4

General Telephone Co. Southwest v. Falcon, 457 U.S. 147 (1982) 7

In re: General Motors Corporation Engine Interchange Litigation, 594 F.2d 1106, (3rd Cir. 1979). 7

Matsushita Electrical Co., v. Epstein, ___ U.S. ___, 116 S.Ct. 873 (1996). 3

State v. Weiss, 706 P.2d 681 (Alaska 1985) . . . . . .passim

Williams v. Vukovich, 720 F.2d 909, (6th Cir. 1983). 5

Weiss v. State, 939 P.2d 380 (Alaska 1997) . . . . . .passim

Constitutional Provisions and Statutes

§202, (a) and (e), Alaska Mental Health Enabling Act (Enabling Act), Pub.L. No.84-830, 70 Stat. 709, 711 (1956) . . . . . passim

Legislative Materials

102 Cong. Rec. 9761 (June 7, 1956) 4

Other Authority

Stern, Gressman, Shapiro & Geller,
Supreme Court Practice, (7th ed. 1993) 2

S. Fairfax, *The School Trust Lands:*
A Fresh Look at Conventional Wisdom,
22 Envtl. L. 797 (1992) 6

REPLY IN SUPPORT OF PETITION FOR *CERTIORARI*

Petitioners Weiss, *et al.*, respectfully reply to the oppositions of the State of Alaska and H.L., *et al.*, to their petition for a *writ of certiorari* to review the judgment of the Alaska Supreme Court in this case.

REASONS FOR GRANTING REVIEW

1. The Court has Jurisdiction to Review the Set-Off Decision

Respondents agree with Petitioners that the *Weiss I* holding that the State may diminish the corpus of the Trust in the amount of its expenditures on its mental health program (the "set-off") is an adjudication of federal rights on the merits.[1] However, citing *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), both Oppositions assert that the Court does not have jurisdiction to consider the issue because Petitioners were required to file an *interlocutory* petition for *certiorari* immediately after the *Weiss I* decision.[2] State Opp. at 1; H.L. Opp. at 5. *Cox* describes certain very limited situations where the Court *may* take jurisdiction before a case is finally adjudicated. Indeed, the reasons for the *Cox* exceptions to the final judgment rule support review in this case, i.e., that "later review of the federal issue cannot be had" and failure to review "might seriously erode federal policy." 420 U.S. at 481 and 483, respectively.

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[1] At page 5 of its Opposition, the State asserts the settlement "does not include any set-off." This statement is untrue. The Alaska courts accepted a $600 million diminution of Trust *corpus* value because "the set-off . . . 'has the capacity to destroy any affirmative cash recovery regardless of how many lands are determined to have been 'sold.' ' " App. A at 27 and n.14; App. C at 71.

[2] Respondents' position produces a "Catch 22" result because Petitioner Nanuwak was not allowed to intervene in this case until after the time for filing a petition for *certiorari* to *Weiss I* had already passed, and current counsel for Petitioner Weiss was not substituted into the case until even later.

Neither *Cox*, nor any other case *requires* an interlocutory petition for *certiorari* to be filed when a case has been remanded back to the lower court.

> Of course, after remand for further proceedings from a nonfinal decision of the state court [where the federal issue was decided], a final judgment may be obtained at trial, and appellate review of the federal issue may then be pursued. In this posture, Supreme Court review may be properly sought under §1257. The fact that the highest state court in the second appeal refuses to reconsider the federal issues decided in the first appeal does not deprive the Supreme Court of jurisdiction to review the second judgment. *Great Western Tel. Co. v. Burnham*, 162 U.S. 339 (1896); *Louisiana Nav. Co. v. Oyster Commission*, 226 U.S. 99, 102 (1912); *Urie v. Thompson*, 337 U.S. 163, 172-73 (1949); *cf. United States v. United States Smelting Co.*, 339 U.S. 186, 198-99 (1950); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 257-58 (1916); *Mercer v. Theriot*, 377 U.S. 152, 153 (1964); *Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363, 365 n.1 (1973) ... And the state court's designation of the earlier ruling as the law of the case does not affect the power of the court to reexamine the earlier ruling in this context. *Davis v. O'Hara*, 266 U.S. 314, 321 (1924); *Reece v. Georgia*, 350 U.S. 85, 87 (1955); *Hathorn v. Lovorn*, 457 U.S. 255, 261-62 (1982); *Barclay v. Florida*, 463 U.S. 939 (1983); *California v. Rooney*, 483 U.S. 307, 311-14 (1987). Otherwise the orderly process of review would be frustrated, and the litigant would lose all chance for Supreme Court scrutiny of the claim of federal rights.

Stern, Gressman, Shapiro, & Geller, *Supreme Court Practice*, 104-5 (7th ed. 1993). If, however, there are circumstances in which an interlocutory petition for *certiorari* is required, review should also be granted here to clarify those circumstances.

2. Important Federal Rights Were Adjudicated

The Oppositions of the State and H.L. bring into sharp focus the important questions of federal law raised by this Petition. Both assert that, because the Petition arises out of a judgment approving a class action settlement, rather than a direct ruling on the underlying merits of the class' claims, the Court should not grant review. State Opp. at 8; H.L. Opp. at 3. Under Respondents' approach, no matter how crucial the federal rights are to a proper disposition of a class settlement, and no matter how erroneous the state court's analysis of those rights may be, there are no federal questions for this Court to review. Petitioners respectfully suggest that acceptance of Respondents' position grants the states *carte blanche* authority to misapply, to the point of amending, federal law so long as such misapplication arises within a class action settlement. Contrary to Respondents' assertions, this is an issue of nation-wide applicability and importance.

It is particularly so in light of *Matsushita Electrical Co., v. Epstein*, ___ U.S. __, 116 S.Ct. 873 (1996), where the Court made clear that the federal courts are bound to give preclusive effect to state court settlements that include a *federal claim* in which the exclusive jurisdiction to adjudicate lies in the federal court. The *Matsushita* scenario assumes that the Court may correct state court errors by granting a petition for *certiorari*. Yet if the Respondents' position regarding class action settlements is correct, *no federal court* will ever correct the error of federal law. This gives state courts untrammeled leave to circumvent federal law.

Petitioners also suggest that properly construing and enforcing Congress' intent in the Enabling Act is itself an important federal issue as Congress made the determination of the purposes for which this land was to be employed as a condition of its trust grant. Since there will never be a conflict with any other court on this issue, only by granting *certiorari* can the Court "assure that the binding application of federal law is uniform and ultimately subject to control by this Court." *Asarco v. Kadish*, 490 U.S. 605, 621-2 (1989). In other words, review should be granted here because, "later review of the federal issue cannot be had"

and failure to review "might seriously erode federal policy." *Cox, supra,* 420 U.S. at 481 and 483, respectively.

3. Respondents Err in Contending That All Other Authority Pertaining To Federal Land Trusts Is Inapplicable

The Respondents assert that Congress' intent in the Enabling Act was so different from all other Congressional trust land grants that any harm done by failing to grant *certiorari* will only affect Alaska. State Opp. at 9-10; H.L. Opp. at 6. Respondents do not address Petitioners' showing that "the purpose of [the Enabling Act] is the same as in all other similar grants such as the public school land-grant program." 102 Cong. Rec. 9761 (June 7, 1956).[3]

According to Respondents, contrary to *all* other federal trust land grants: (1) the Enabling Act "imposes no affirmative duties on Alaska regarding the management and disposition of trust lands" (H.L. Opp. at 6);[4] (2) the Trust's *corpus* may be diminished in the amount of the State's annual expenditure on its mental health program without consideration of the beneficiaries' interests (State Opp. at 13); (3) conveyances of Trust land without consideration of the beneficiaries' interests and without depositing receipts that may have been received into the Trust, are not a breach of trust and such conveyances are exempt from re-

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[3] The Enabling Act mandates Trust lands be administered "as a public trust." Sec. 202(e), Alaska Mental Health Enabling Act, Pub. L. No. 84-830, 70 Stat. 709 (1956). The only unique aspect of the trust grant is the provision that the Trust be used "first" for the "necessary expenses of the mental health program." *Id.* As explained in *Weiss I*: "Any money received over and above the need for the mental health program may be used for other public purposes . . . only because of worry among members of Congress that the land may actually have a value far in excess of the necessary health care expenses." App. B at n.1.

[4] This statement of settling plaintiffs' counsel demonstrates both that the settlement was measured against the incorrect legal backdrop (i.e., the State does have fiduciary responsibilities under the Enabling Act) and the inadequacy of representation (i.e. intervenors' counsel who supported the settlement did not comprehend the class' legal rights).

covery by the Trust (State Opp. at 13-14); and (4) the beneficiaries are not entitled to mismanagement damages because of *state law* (State Opp. at n.14). Respondents do not dispute that *Weiss II* conflicts with all relevant authority relating to other federal trust land grants, relying instead on the alleged unique, non-fiduciary nature of this trust. In essence, Respondents claim that Congress did not intend to create a trust under the Enabling Act. However, as has been shown, Congress specifically intended the Enabling Act to create a trust with the same fiduciary obligations of the other trust land grants.

4. The Alaska Supreme Court's Approval Of A Management Scheme That Violates Federal Law Is Ripe For Review

The State argues it is premature to raise any illegality in the settlement under federal law because no illegal actions have occurred yet. State Opp. at 17. However, it is the approval of a settlement that allows illegal actions that mandates disapproval, *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983), and strongly suggests review by the Court.

Weiss II approved a settlement which allows a divided loyalty regime in violation of federal law. *County of Skamania v. State of Washington*, 685, P.2d 576, 580 (Wash. 1984). *Weiss II* expressly held that other congressional trust land grants do not require the undivided loyalty of the trustee (management for non-trust interests "is not necessarily incompatible with trust principles, even under the stringent rules governing school trust lands"). App. A. at 33-34. This holding conflicts with all other controlling authority *and is expressly not limited to the posited "unique" nature of the Alaska Mental Health Land Trust.*

As indicated in the Petition, *Weiss II's* holding that federally granted *school trust lands* need not be managed with undivided loyalty will encourage other states to violate the duty of undivided loyalty. Indeed, the 1992 law review article relied upon by the court in *Weiss II* as support for its conclusion that the settlement's management scheme is legal (App. A at n.25), is

entirely devoted to the proposition that the courts have enforced the duty of undivided loyalty too vigorously:

> The purpose of this Article is to suggest that the conventional wisdom [court decisions requiring the trusts to be managed solely for the purposes designated by Congress] is misleading. . . . [P]ressure from environmentalists and evolving notions of what constitutes ecologically sound and *politically acceptable* land management have led some states to seek flexibility.

S. Fairfax, *The School Trust Lands: A Fresh Look at Conventional Wisdom*, 22 Envtl. L. 797, 799-800 (1992) (emphasis added, footnotes omitted). The Alaska Supreme Court's decision in *Weiss II* creates new federal law opening up all federal trust land grants for use by non-trust interests. The Court should correct this.

5. The Settlement Was The Result Of Inadequate Representation

Respondents assert that Petitioners' inadequacy of representation claim is no more than "want of an incantation that 'representation was adequate.' " State Opp. at 23. *See also* H.L. Opp. at 9. Nothing could be further from the truth. Petitioners' claim is that, as a matter of law, the settlement was the result of inadequate representation because (1) Original Class Counsel, without consultation with any class member, stipulated to the set-off, and (2) Respondents H.L., who were never designated as Class Counsel or replaced Petitioners, among other things, agreed to a settlement which incorporates the set-off, without having any idea of the extent of a major class claim -- mismanagement damages. As H.L.'s counsel said to the trial judge:

> I am not suggesting by that that those [mismanagement] claims haven't been made and that they don't exist and that they might be real. It's just that there's been no discovery to establish their size, the extent, the legitimacy of them . . .

(Tr. XXVI-751). Even if there had been an express determination that the settlement was the result of adequate representation, such a finding fails because, as shown, representation was inadequate as a matter of law.[5]

Contrary to the assertions of Respondents (*See* H.L. Opp. at 11), this case presents a clear opportunity for the Court to enunciate the minimum due process requirement for adequacy of representation in class action settlements. In other words, is the due process requirement of adequacy of representation satisfied when class counsel stipulates to the waiver of a major class defense without consulting any class member, without scrutiny by the court, when the waiver is legally unwarranted, and when, as a legislator, he voted for the challenged legislation? Similarly, is due process satisfied when counsel settles a class action without any idea of the "size, extent or legitimacy" of a major class claim?

The Court has indicated that adequacy of *counsel's representation* is an issue which might be addressed by the Court at some point. *Amchem Products, Inc. v. George Windsor*, No. 94-1474 at 20, n.20 65 U.S.L.W. 4635 (June 25, 1997); and *General Telephone Co. Southwest v. Falcon*, 457 U.S. 147, n.13 (1982). While both *Amchem* and *General Telephone* declined to enunciate the standard for counsel's representation because they were decided on other grounds, the Court has made clear that adequacy of class counsel is an integral part of a binding class action. In addition, the State and H.L. do not deny that the settling intervenors were never designated class representatives. Thus, according to Respondents, the class should be bound to a settlement that was not accepted by any class representative or

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[5] The State asserts that Petitioners did not raise the issue of inadequate representation before the trial court. State Opp. at 23. This is untrue. In their opposition to final approval, Petitioners raised specific instances of inadequate representation, and cited *In re: General Motors Corporation Engine Interchange Litigation*, 594 F.2d 1106, 1124-26 (3rd Cir 1979), for the proposition that a "stringent examination of the adequacy of representation by . . . counsel" is required. R. at 23764 -23772.

any class counsel. *Weiss II* holds that adequacy of counsel's representation is not a class action requirement ("[no] authority requires the trial court to make a specific finding that the class is adequately represented by counsel"). App. A at n.30. This case presents an excellent opportunity to make it clear to the states that adequacy of counsel's representation is required.

6. The Issues Raised by Petitioners Are Properly Before the Court

In their effort to persuade the Court to deny review, Respondents assert that various issues have been waived by Petitioners or represent inconsistent positions. For example, Respondents claim Petitioners have waived or acted inconsistently with respect to challenging the set-off holding and mismanagement damages. State Opp. at 12 and 16. Carefully excised from the quote at page 12 regarding the setoff is Petitioners' statement that they "disagree that the trustee should be able to dissipate the trust in this manner [via the set-off]." Exc. 1064. This is hardly a waiver or an inconsistent position.

The State also asserts that Petitioners waived the right to contest the set-off because the Alaska Supreme Court said counsel for Petitioner Nanuwak stated his "general satisfaction" with *Weiss I*. State Opp. at n.15. Any "general satisfaction" with *Weiss I* certainly did not encompass an interpretation that: (1) the setoff to "sold" lands applies to 350,000 acres of land the State still owns; (2) the hitherto unanimous authority that the Trust could recover land conveyed in breach of trust does not apply; and (3) that the Trust can not recover mismanagement damages.

Similarly, when the State asserts at page 16 that Petitioners waived the mismanagement damages claim with an inconsistent statement, the State omits the preceding sentence from its quote, to wit: "The [Petitioners] also argue that before taking the setoff the court should consider what the trust should have earned if it had been properly managed." Again, this is hardly a waiver

or an inconsistent position.[6]

Another claim of waiver (or estoppel) made by Respondents is that the class definition adopted by the trial court was the same one that Petitioners urged and therefore Petitioners are estopped from seeking review of it. H.L. Opp. at 12. But Petitioners are not seeking review of the class definition. They are seeking review of the Alaska courts' determinations "allowing the Alaska State Legislature to add to the beneficiaries specified by Congress" and that "the mentally retarded and mentally defective are beneficiaries" of the Trust. Petition at 25 and 26, respectively.[7]

The definition of the class is a different (albeit related) matter. The motion Respondents point to had to be made by Petitioners because Respondents refused to address the improper situation that the defined class did not consist of those whose rights were supposedly being enforced. Prior to the motion, the class was defined as "all persons who are residents of the State of Alaska and who will require mental health services in the future which are not available in the State of Alaska." App. C at 8. As pointed out in Petitioners' motion below, (Exc. 1171-2), this class definition excluded those currently receiving mental health services, but included everyone else, because they might be in need of such services in the future. Petitioners recognized that

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[6] The context of these statements is also important. They were made in support of the 1992 settlement agreement between Petitioners and the State, from which the State withdrew in 1994. Exc. at 565, ¶ 95. The 1992 settlement provided a *100% recovery of the Trust's economic value, including income production.* Exc. 289. Because of the Enabling Act's provision that income in excess of the needs of the mental health program could be used by the State for other purposes (*see infra* n.3.) and because it isn't possible to spend the money on the mental health program that should have been spent in the past, any recovery of *income* damages above the Trust's original corpus value would not accrue to the class.

[7] Respondents do not dispute that these determinations adjudicate federal rights (as opposed to "weighing" them as "litigation risks" in the settlement approval process).

the class had to consist of the beneficiaries of the Trust if those were the rights being enforced.

H.L. opposed the motion and redefinition he now supports saying: "Were this court to now redefine the class as Weiss proposes, it would be acknowledging that a class action of some ten-year duration had been prosecuted by non-class members." R. at 21805. The issue of whether Petitioners should be estopped from appealing the trial court's determination of the Trust's beneficiaries was briefed to the Alaska Supreme Court. H.L. Br. at 9; Pet. Reply Br. at 24. The Alaska Supreme Court did not hold that Petitioners were estopped and neither should this Court.

Petitioners respectfully urge the Court to recognize Respondents' claims of waiver and inconsistent positions to be what they are: attempts to obfuscate the serious errors committed in *Weiss II* in applying federal law and the concomitant conflict with the decisions of this and other courts respecting the due process requirements of class action settlements.

CONCLUSION

For the foregoing reasons, Petitioners respectfully urge their Petition for Writ of *Certiorari* be granted.

Respectfully Submitted.

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